

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs September 16, 2008

**JAMES H. CARTER v. STATE OF TENNESSEE**

**Direct Appeal from the Circuit Court for Grundy County**  
**No. 4020 J. Curtis Smith, Judge**

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**No. M2007-02003-CCA-R3-PC - Filed October 14, 2008**

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The petitioner, James. H. Carter, appeals the post-conviction court's denial of his petition for post-conviction relief. On appeal, he argues that he received the ineffective assistance of counsel at his sentencing hearing. After a thorough review of the record and the parties' briefs, the judgment of the post-conviction court denying post-conviction relief is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

J.C. McLIN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER, JJ., joined.

Andrew Peters Davis, Winchester, Tennessee, for appellant, James H. Carter.

Robert E. Cooper, Jr., Attorney General and Reporter; and Jennifer L. Bledsoe, Assistant Attorney General; James Michael Taylor, District Attorney General; Steven H. Strain, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**BACKGROUND**

The petitioner pled guilty to two counts of burglary, Class D felonies; two counts of vandalism over \$1,000 but less than \$10,000, Class D felonies; and one count of resisting arrest, a Class B misdemeanor. Subsequently, the trial court sentenced the petitioner to four years for each burglary and vandalism conviction and six months for his resisting arrest conviction. The trial court ordered the petitioner's burglary convictions to run consecutively with the remaining convictions to run concurrently, for a total effective sentence of eight years. The trial court based its sentencing determinations on the fact that the petitioner had a lengthy criminal history. The petitioner's convictions and sentences were affirmed on direct appeal. *State v. James H. Carter*, No. M2005-01162-CCA-R3-CD, 2006 WL 304654 (Tenn. Crim. App., at Knoxville, Feb. 8, 2006),

*perm. app. denied* (Tenn. July 3, 2006). The following is a summary of the facts of the case taken from this court's opinion on direct appeal:

On June 1, 2004, the [petitioner] broke into a restaurant and a pharmacy, causing damage to each property in excess of \$1,000. When confronted by the Tracy City Police, the defendant refused to cooperate. At the sentencing hearing, the [petitioner] explained that on the night of the offenses, he had been taking prescription medication for anxiety attacks, which reacted with the alcohol he had consumed, causing "a pretty messed up state." He claimed that he went to a bar and remembered nothing until he found himself in a pipe. The [petitioner] contended that when he attempted to climb out of the pipe, he broke free, landed in a restaurant, and was trying to escape when a police officer arrived. He insisted that he actually complied with the orders of the officer but the officer sprayed him with pepper spray anyway.

*Id.* at \*1.

The petitioner filed a timely petition for post-conviction relief. Thereafter, counsel was appointed and an evidentiary hearing was held. At the hearing, the petitioner's trial counsel testified that he "inherited" the petitioner's case from another attorney, and it was the first sentencing hearing he had handled on his own. However, counsel noted that he became familiar with the sentencing procedures before the date of the petitioner's sentencing hearing. Counsel admitted that he did not file any specific mitigating factors in the petitioner's case. Counsel stated that he and the petitioner discussed the petitioner's options, including potential defenses such as intoxication, and the potential range of punishment for the charged offenses. Counsel said he made it clear that it was the petitioner's decision to accept or reject the guilty plea offer. Counsel recalled that he recommended the plea offer so the petitioner could avoid Range II sentencing. Counsel said he reviewed the presentence report with the petitioner, which reflected that the petitioner had a criminal record but had not committed any crimes before the age of thirty-four. According to counsel, the petitioner told him that his criminal record was related to drug and alcohol abuse.

Counsel recalled that he argued to the court at the sentencing hearing that the petitioner's convictions arose from a single episode of criminal conduct as the two businesses were connected to each other. Counsel also recalled that he made the court aware that the victim's statement indicated that a three-year sentence would suffice. Counsel noted that the petitioner told him that he broke into the building because he had nowhere to go after being released from jail and had consumed alcohol and Xanax. The petitioner also told counsel that he ate some ice-cream after breaking into the building. Counsel acknowledged that he did not check the petitioner's medical records to determine why the petitioner had been prescribed Xanax in jail, but he assumed it was prescribed for anxiety.

Regarding mitigating factors, counsel admitted that the petitioner's conduct did not cause or threaten serious bodily injury. He also agreed that the facts surrounding the petitioner's conduct

could have been argued as grounds tending to justify the criminal conduct, though failing to establish a defense. The petitioner also noted that other mitigating factors could have been argued at the sentencing hearing but the arguments could have diminished credibility with the court and caused a “whiplash effect.” Counsel explained his strategy as follows:

My strategy at the hearing was to present to the Court that [the petitioner’s] offenses involved a business[;] there was no direct threat to a human being. It was a crime against property. It was one course of criminal conduct. I believe that was reflected in the pre-sentence report and I relied upon that.

Counsel recalled that he discussed with the petitioner the possibility of split confinement. They were hopeful that the court would impose split confinement and give the petitioner credit for time served. Counsel further noted that the petitioner was allowed allocution at the sentencing hearing.

On cross-examination, counsel testified that a major concern with the petitioner’s case was the possibility of the state requesting the petitioner be classified as a Range II offender which would expose the petitioner to a longer sentence. Counsel recalled that the state agreed to take a neutral position on consecutive sentencing at the hearing. Counsel also recalled that the trial court heard the arguments of both parties, then took a break to review and consider the information in the pre-sentence report. The court found no mitigating factors. Counsel noted that the petitioner had received two plea offers by the state while being represented by former counsel. However, counsel said the plea offer of four years was rejected by the trial court.

The petitioner testified that his former counsel and counsel never discussed the case with each other. The petitioner recalled that a four-year plea agreement was submitted to the court on the trial date. However, the court refused to accept the agreement. As a result, the petitioner agreed to enter an open plea and a sentencing hearing was set for a later date. The petitioner recalled that counsel spoke to him once prior to the sentencing hearing. At the time, the petitioner told counsel that he had a family and had never committed a crime before the age of thirty-four. The petitioner also told counsel that alcohol and drugs played a huge role in the commission of the crimes to which he pled guilty. The petitioner further told counsel that he had been abandoned at the time the offenses were committed, had taken alcohol and Xanax, and was not clear about several things that happened. The petitioner testified that the state prosecutor led him to believe that consecutive sentencing would not be sought.

On cross-examination, the petitioner admitted that he pled guilty to the offenses and knew that he qualified as Range II offender. He claimed that he pled guilty because counsel told him that he would receive a four-year sentence, and the state would not push for consecutive sentencing. However, the petitioner acknowledged that he was aware of the fact that the court ultimately determined the length and manner of service of his sentences.

At the conclusion of the hearing, the post-conviction court denied relief, finding that the petitioner failed to prove he received the ineffective assistance of counsel. The petitioner now appeals.

## ANALYSIS

In this post-conviction appeal, the petitioner argues that trial counsel was ineffective because counsel did not present mitigating factors to the court at the sentencing hearing. Specifically, the petitioner complains that counsel was deficient in not emphasizing the fact that the petitioner's offenses stemmed from one criminal episode, that alcohol and drug abuse were factors relevant to the commission of the offenses, and that the petitioner, up until age thirty-four, was a hardworking, taxpaying, family man.

In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations of fact set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). A post-conviction court's findings of fact are entitled to substantial deference on appeal unless the evidence preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 579 (Tenn. 1999). Our review of the post-conviction court's factual findings, such as findings concerning the credibility of witnesses and the weight and value given their testimony, is de novo with a presumption that the findings are correct. *See id.* Our review of the post-conviction court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001).

In order to establish the ineffective assistance of counsel, the petitioner bears the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense rendering the outcome unreliable or fundamentally unfair. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Arnold v. State*, 143 S.W.3d 784, 787 (Tenn. 2004). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness under prevailing professional standards. *Strickland*, 466 U.S. at 688; *see also Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (establishing that representation should be within the range of competence demanded of attorneys in criminal cases). A fair assessment of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). The fact that a particular strategy or tactical decision failed does not by itself establish ineffective assistance of counsel. *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996). Once the petitioner proves that counsel's representation fell below a reasonable standard, the petitioner must also prove prejudice. Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Should the petitioner fail to establish either element of ineffective assistance of counsel, the petitioner is not entitled to relief. *Goad*, 938 S.W.2d at 370 (citing *Strickland*, 466 U.S. at 697).

In the instant case, the post-conviction court found that trial counsel was not ineffective. The court stated as follows:

We heard proof regarding . . . mainly whether [trial counsel] should have argued certain mitigating factors, perhaps some other issues. In actuality the [petitioner's complaint] has to do with . . . as far as consecutive sentencing is concerned has to do with his criminal record. As I stated, and again was stated by the Court of [Criminal] Appeals, there is a statutory scheme for considering consecutive sentencing, and [the trial court imposed] consecutive sentencing based on [the petitioner's] extensive criminal record.

. . . . If the Court had been considering this issue of mitigating factors, [the Court] find[s] that [trial counsel's] representation was not deficient in this regard. But for the sake of argument, even assuming that it had been, it did not result in any prejudice to [the petitioner] because the issue was his record, his criminal record[,] that is the reason he got consecutive sentencing . . . which is something [counsel] could do nothing about . . . .

So in summary, I don't find that [trial counsel's] representation was deficient and certainly . . . it didn't prejudice [the petitioner's] constitutional rights. Again, [the petitioner] needs to understand that he was sentenced consecutively, if he read the Court of [Criminal] Appeals opinion and if he listened to what [this Court] said, he was sentenced consecutively because of his criminal record. It had nothing to do with enhancing and mitigating factors, those are normally considerations for setting the length of sentences not determining whether or not they're consecutive.

The record does not preponderate against the post-conviction court's findings. The record shows that the petitioner was allowed to read a statement of apology at the sentencing hearing wherein the court was apprised of most of the mitigating circumstances the petitioner complains were not presented by counsel. The record also reflects that the petitioner's counsel presented a number of mitigating circumstances in his opening and closing remarks to the court. Nonetheless, the petitioner received a total effective sentence of eight years based upon his extensive criminal record. The petitioner has failed to show either deficient performance by counsel or resulting prejudice and is not entitled to relief.

## **CONCLUSION**

Based on the foregoing reasoning and authorities, we affirm the judgment of the post-conviction court.

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J.C. McLIN, JUDGE